

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FRED D. McCREARY,

Appellant,

vs.

LAWRENCE E. WILSON, Warden,  
California State Prison,  
San Quentin, California,

Appellee.

No. 20979 ✓

APPELLEE'S BRIEF

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JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 224. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts.

On September 27, 1962, Fred D. McCreary, petitioner and appellant, was sentenced by the Superior Court of Alameda County to the state prison for the



term prescribed by law for the violation of the California Penal Code section 187 (murder) upon his plea of guilty (TR 3).<sup>1</sup>/ Appellant did not appeal.

Appellant applied to the California Supreme Court for a writ of habeas corpus, which was denied on February 9, 1966 (TR 6-7).

B. Proceedings in the federal courts.

On March 1, 1966, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (TR 2). In his petition he alleged that he was interrogated by police officers without being advised of his right to counsel or his right to remain silent, and that the statements he made to the police officers induced his plea of guilty. On March 4, 1966, petitioner's motion to file in forma pauperis was denied solely on the basis that Escobedo v. Illinois, 378 U.S. 478 (1964) does not operate retroactively to affect convictions final before that decision (TR 1).

On April 5, 1966, the court granted petitioner's motion for a certificate of probable cause and allowed petitioner to file notice of appeal in forma pauperis (TR 35). Notice of appeal was filed on April 15, 1966 (TR 36).

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1. "TR" refers to the Transcript of Record on this appeal.

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## SUMMARY OF APPELLEE'S ARGUMENT

The Escobedo rule does not apply retroactively.

## ARGUMENT

In both his petition to the District Court for a writ of habeas corpus, and his brief to this Court seeking reversal of the order denying the writ, appellant bases his attack upon his state conviction on a retro-active application of Escobedo v. Illinois, supra. He contends that the charges to which he pled guilty were supported in part by statements elicited from him in violation of the Escobedo rule.

This case is governed by Johnson v. New Jersey 34 U.S.L.Week 4592 (June 20, 1966), in which the Supreme Court of the United States has definitely declared that Escobedo affects only those cases in which the trial began after June 22, 1964, the date of that decision. As noted above, the proceedings which culminated in the judgment that petitioner now seeks to collaterally attack began and were concluded in 1962, long before the date of the Escobedo decision. Consequently, appellant's petition to the district court did not state grounds for relief and was properly denied.

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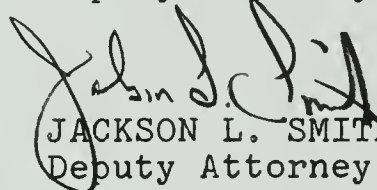
CONCLUSION

We respectfully submit that the order of the District Court should be affirmed.

Dated: July 11, 1966.

THOMAS C. LYNCH,  
Attorney General of California

ROBERT R. GRANUCCI,  
Deputy Attorney General

  
JACKSON L. SMITH,  
Deputy Attorney General

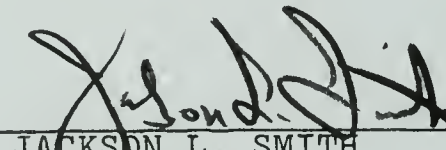
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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: July 11, 1966.

  
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JACKSON L. SMITH,  
Deputy Attorney General

